SUPREME COURT OF THE UNITED STATES.

October Term, 1923.

No. 220.

GEORGE W. COOK, Plaintiff in Error,

vs.

GALEN L. TAIT, United States Collector of Internal Revenue for the District of Maryland.

In Error to the District Court of the United States for the District of Maryland.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

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I.

Section 210 of the Revenue Act of 1921 is as follows:

> "Sec. 210. That, in lieu of the tax imposed by Section 210 of the Revenue Act of 1918, there shall be levied, collected and paid for each tax-

able year *upon the net income* of every individual a normal tax of 8 per centum of the amount of the net income in excess of the credits provided in Section 216: *Provided, that in the case of a citizen or resident of the United States* the rate upon the first $4,000 of such excess amount shall be 4 per centum."

The act lays a tax upon the income.

The learned Solicitor-General is driven to take the position in his brief, first, that the income tax is merely a tax upon the person of the plaintiff in error because of his citizenship and not on any property right of his; and, second, that the person of the plaintiff in error is within the jurisdiction of the United States for purpose of taxation, and therefore the tax must be sustained. In assuming the first of these two positions, the Solicitor-General must be taken to have admitted that if the tax is upon the property rights of the plaintiff in error, the tax must fail.

The Solicitor-General has not cited any cases in point on either of these two propositions. This Court is asked to overturn a hitherto undisputed rule of law and unbroken line of authorities establishing that the tax is not a mere tax upon the individual. It is clear both under the terms of the act itself and under the decisions of this Court that a property right is

the object of this tax, namely, the income taxed and the right to receive it, realized in the shape of income.

As was said by Mr. Justice Wayne, in Dobbins v. the Erie County Commissioners, 16 Pet. 435, speaking of a general income tax:

> "Taxes regard the persons of men only because of their goods. The goods then are taxed and not the person" (16 Pet., l. c. 446).

Mr. Justice Swayne, in Springer v. United States, 102 U. S. 586, speaking of the federal income tax under the Act of July 1, 1862, said:

> "It is not a tax on the '*whole* * * * *personal estate*' of the individual, but only on his income, gains and profits during a year which may have been but a small part of his *personal estate*, and in most cases would have been so" (102 U. S., l. c. 598). (Italics ours.)

The Attorney-General of the United States, in his argument in favor of the tax in the case of Pollock v. Farmers Loan & Trust Company, 157 U. S. 429, as reported on page 503, in speaking of the Income Tax Law of 1894, said:

> "The whole scope and tenor of the statute show the object of the contemplated tax to be *personal property* and nothing else."

And in the opinion of the Court in the Pollock case, supra, Mr. Chief Justice Fuller said of the same tax:

> "This law taxes the income received from land and the growth or produce of the land" (157 U. S., l. c. 581).

The Pollock case is best known by reason of having decided that an income tax upon the income from real estate and personal property is a direct tax upon the real estate and upon the personal property; but before that result could be arrived at the Court first decided that it was a tax upon the income and not upon the individual. And, on the latter proposition, we respectfully submit, that decision has never been questioned until the learned Solicitor-General questioned it in this case.

The late Mr. Chief Justice White, in the case of Brushaber v. The Union Pacific Railroad Company, 240 U. S. 1, in commenting on the Pollock case, said that that case did not question at all that in common understanding an income tax was direct on income (l. c. 16). And further, on page 18, he said that the tax is upon the income upon which it directly operates, and again, on page 19, speaking of the purpose of the Sixteenth Amendment:

> "That the purpose was not to change the existing interpretation except to the extent neces-

> sary to accomplish the result intended, that is, the prevention of the resort to the sources from which a tax income was derived in order to cause a *direct tax on the income* to be a direct tax on the source itself." (Italics ours.)

And in Maguire v. Trefry, 253 U. S., page 16, Mr. Justice Day said of the income tax statute of Massachusetts:

> "It is true that the legal title of the property is held by the trustee in Pennsylvania. But it is so held for the benefit of the beneficiary of the trust, and such beneficiary has an equitable right, title, and interest distinct from its legal ownership. The legal ownership holds the direct and absolute dominion over the property, in view of the law; but the income, profits, or benefits thereof in his hands belong wholly or in part to others" (2 Story Eq., 11th Ed., Sec. 964). *"It is this property right belonging to the beneficiary realized in the shape of income,* which is the subject-matter of the tax under the statute of Massachusetts" (253 U. S., l. c. 16 and 17).

The act in terms taxes the income and it is only an income tax which the amendment authorizes to be levied without apportionment, not a mere tax upon the individual. As was said by the Solicitor-General in his argument in favor of the corporation

tax of 1909 in the case of Flint v. Stone Tracy Company, 220 U. S. 107:

> "The nature of the tax is determined by its subject matter * * * that upon which it is laid."

Applying the same test here the tax is upon the income.

Other parts of the act itself bear out this interpretation. For example, the act taxes the income of the estate of a decedent during administration; it taxes the income accumulated in trust for the benefit of unborn or unascertained persons or persons with contingent interest or held for future distribution under the terms of a will or trust. The petition contended for by the Solicitor-General in this case would prevent the United States from taxing the income of nonresident aliens; for we do not suppose that he would go so far as to contend that the United States may levy a tax upon a nonresident alien as an individual, nor upon unborn persons as individuals.

The Government cites the Brushaber and the Stanton cases as authorities for the proposition that since the adoption of the amendment, the income tax has become an indirect tax and that therefore it is a tax upon the individual. But such is not the hold-

ing of the Brushaber and Stanton cases. On the contrary, they are authorities for the plaintiff in error that the tax is laid upon the income, which is a property right. In fact, these cases hold that the income tax is just what it has always been, *a tax upon the income*, and that the sole purpose of the amendment was to prevent an apportionment between the states because of the source from which the income was derived. To assert that Mr. Chief Justice White in those cases said that the effect of the amendment was to make the tax merely one upon the individual, as such, is to put into the opinion what is not there.

The Government's assumption that all indirect taxes are levied merely upon individuals is not borne out by the authorities but directly contrary thereto. We have already pointed out in the original brief that many indirect taxes, to wit, inheritance and succession taxes, franchise taxes and others are taxes upon property rights. We will not repeat these authorities here but respectfully refer the Court to our original brief herein.

Nor does the fact that the tax may be a personal charge make it a tax upon the individual. All taxes are paid by some person. Taxes upon the person, as such, are capitation taxes, and are not freed from apportionment under the Sixteenth Amendment; taxes upon property, as such, or upon individuals because

of their property are property taxes. By the statutes of many states, direct ad valorem taxes levied on real estate are made the personal obligation of the owner, but that fact does not change the nature of the tax, nor make it a tax upon the individual owner who is rendered liable therefor.

As was said by Mr. Chief Justice Fuller in the Pollock case:

> "It has always been considered that a tax upon real estate *eo nomine* or upon *its owners in respect thereto* is a direct tax in the meaning of the Constitution" (157 U. S., l. c. 580).

That Mr. Chief Justice White recognized that the Sixteenth Amendment did not change the former construction by the Supreme Court making the tax a "direct tax," so far as the "income" itself is concerned—and, therefore, a tax on property, or a property right, as contrasted with a tax on a "person" as an individual, is made clear by the language of the learned Chief Justice himself (240 U. S., l. c. 18 and 19).

Very well, then; here we are again! The Pollock case is still the law, and more than that it is now firmly embedded in the Constitution, as stated by Mr. Chief Justice White, who also declared the tax to be "direct" upon the income. So we will stop the "direct" element at the "income," without bothering about the source; but the "power" of taxation

is unchanged, and must be so interpreted under the Brushaber case.

The construction given to the Sixteenth Amendment, in the light of the Pollock case, and the interpretation of the Pollock case by the Supreme Court since the Sixteenth Amendment and since the opinion by Mr. Chief Justice White in the Brushaber case, is clearly to the effect that the principles of the Pollock case are to be applied just as much since the Sixteenth Amendment, and since the Brushaber opinion, as before. And see later cases: Eisner v. Macomber, 252 U. S., l. c. 206; also the concurring opinion in Citizens National Bank v. Durr, 257 U. S., l. c. 110, by Mr. Justice Holmes, Mr. Justice Van Devanter and Mr. Justice McReynolds (Nov. 2, 1921), which specifically approve the rule stated in the Pollock case.

Nothing in the law is changed, except the necessity for the apportionment. Direct taxes are still direct taxes, as fully as if the Sixteenth Amendment had never been adopted, even if it is not necessary to call them so in order to collect them. Furthermore, the construction placed on the Brushaber case in this argument by us is fully sustained by the majority opinion written by Mr. Justice Pitney, in Eisner v. Macomber, 252 U. S., l. c. 205, where it is said (referring to the Sixteenth Amendment):

"As repeatedly held, this did not extend the taxing power to new subjects, but merely removed the necessity which otherwise might exist for an apportionment among the states of taxes laid on income (Brushaber v. Union P. R. Co., 240 U. S. 1, 17-19; Stanton v. Baltic Min. Co., 240 U. S. 103, 112, et seq.; William E. Peck & Co. v. Lowe, 247 U. S. 165, 172, 173)."

Further convincing authority as to the continuing force of the Pollock case and the unity of it with the cases decided since the Sixteenth Amendment is found in the opinion by Mr. Justice Holmes, in Gillespie v. Oklahoma, 257 U. S. 501, Jan. 30, 1922, and especially the quotation beginning (p. 505):

"(2) In cases where the principal is absolutely immune from interference, an inquiry is allowed into the sources from which net income is derived, and if a part of it comes from such a source, the tax is pro tanto void (Pollock v. Farmers' Loan & Trust Co., 157 U. S. 429, a rule lately illustrated by Evans v. Gore, 253 U. S. 245, and applied in a case somewhat like the present by the Supreme Court of Hawaii, Oahu Ry. & Land Co. v. Pratt, 14 Hawaii 126). Whether this property could be taxed in any other form or not, it cannot be reached as profits or income from leases such as those before us. The same considerations that invalidate a tax upon the leases invalidate a tax upon the profits of the leases; and, stopping short of theoretical pos-

> sibilities, a tax upon such profits is a direct hamper upon the effort of the United States to make the best terms that it can for its wards (Weston v. Charleston, 2 Pet. 449, 468, 7 L. ed. 481)."

In distinguishing the juridical meaning of "taxable person," the case of Dobbins v. The Erie County Commissioners, 16 Pet. 435, is so apt, and the contention made by the State of Pennsylvania so similar to that made by the Government in this case, that we deem it worth quoting here. The argument made for the tax by Mr. Penrose, as reported at page 438, is as follows:

> "Captain Dobbins was a 'taxable person,' a citizen of Erie County, who enjoyed the privilege of a citizen, and the protection of the state government. He was clearly, as such, liable to taxation.
>
> "In determining the amount of the tax the sovereign state had a right to say, arbitrarily, that he should pay so much, or, which is more just, to ascertain his income, and, by rating that, fix a tax proportioned to it."

Mr. Justice Wayne, however, in the opinion of the Court answered that argument in the following words:

> "It will not do to say, as it was said in argument, that though the language of the act may

import that offices and posts of profit were taxable, that it was the citizen who holds the office whom the law intended to tax, and that it was a burden he was bound to bear in return for the privileges enjoyed, and the protection received from government; and, then, that the liability to pay the tax was a personal charge, because the person upon whom it was assessed was a taxable person.

"The first answer to be given to these suggestions is that the tax is to be levied upon a valuation of the income of the office. But, besides, the obligation upon persons to pay taxes is mistaken, and the sense in which a tax is a personal charge is misunderstood. The foundation of the obligation to pay taxes is not the privileges enjoyed or the protection given to a citizen by government, though the payment of taxes gives a right to protection. Both are enjoyed, as well by those members of a state who do not, because they are not able to pay taxes, as by those who are able and do pay them. Married women and children have privileges and protection, but they are not assessed, unless they have goods or property separate from the heads of families. * * * And the only sense in which a tax is a personal charge is that it is assessed upon personal estate and the profits of labor and industry. It is called a personal charge to distinguish such a tax from the tax upon lands and tenenments which are enforced without any regard to the persons who are the owners. Taxes are never assessed unless it be

> a capitation tax upon persons as persons, but upon them on account of their goods and the profits made upon professions, trades and occupations. They are so imposed because public revenue can only be supplied by assessments upon the goods of individuals—'comprehending under the word "goods" all the estate and effects which everyone hath, of whatsoever sort they be. Taxes regard the persons of men only because of their goods.' The goods then are taxed and not the person" (16 Pet., l. c. 445 and 446).

Taxes upon individuals, as such, are capitation taxes. Counsel for plaintiff in error have never before heard of an indirect tax on a person as such. A poll tax is a direct tax (Const. U. S., Art. I, Sec. 9, Sub. 4); and is not included in the Sixteenth Amendment.

II.

The second part of the Government's position, viz., that the tax is upon the plaintiff in error as an individual and that his person is subject to the jurisdiction of the United States for purpose of taxation is not sustained by any authorities in point. The authorities cited by the Solicitor-General consisted of cases like Nevada Bank v. Sedgwick, 104 U. S. 111; Memphis and Charleston Railroad Company v. the United States, 104 U. S. 228; United States v. Bennett, 232 U. S. 299, and Porto Rico Coal Company

v. Edwards, 275 Fed. 104, in all of which cases the taxpayer was domiciled within the United States, and United States v. Bennett has no application to the case at bar, because not relating to income taxes which Mr. Chief Justice White himself, in the Brushaber case (240 U. S. 1, 18 and 19) said is a tax directly upon the income, and, therefore, is not upon a particular use, such as the use of foreign-built yachts.

The Solicitor-General also quotes the dictum in United States v. Goelet, 232 U. S. 293, which we have already discussed in our original brief, at page 45. The Solicitor-General also quotes from text writers on international law and from Ruling Case Law.

It is interesting to note that not a single case from this court is cited by these writers upon the point contended for here by the Government, and we confidently assert that there are none, for the Government, with its great resources of investigation and search, would surely have found them and cited them to this Court.

But this Court has decided in the leading case of United States v. Rice, 4 Wheat., page 247, that the United States cannot lawfully impose taxes upon its citizens domiciled within another sovereignty; and that so far as the taxing power is concerned such citizens only owe such taxes as the sovereign of the soil may choose to impose. And this, although the

Town of Castine was in the territory belonging to the United States and only temporarily in the possession of great Britain. Mr. Justice Story said:

> "The laws of the United States could no longer be rightfully enforced there, or be obligatory upon the inhabitants who remained and submitted to the conquerors" (4 Wheat., l. c. 254).

Regarding the authors on international law quoted by the Government, the rule in this court is that the only international law which is recognized as part of our municipal law is to be found in the decisions of this Court. We submit that the case of United States v. Rice, supra, announces the rule applicable to the taxing power of the United States whatever may be the laws and practices of other nations.

We are not dealing with the law of crimes, nor with extra territorial extensions of sovereignty, such as is recognized to exist over the ships flying our flag; or over ambassadors, ministers or consuls; nor with extensions of sovereignty by treaty; nor with the war powers. We are not dealing with the relation between the United States and foreign nations or their nationals. In fact, we are not dealing with the United States as an international sovereign at all, but solely with its taxing power, and especially we

are dealing with that taxing power with relation to the property of the plaintiff in error located in Mexico.

The assertion of the Government that the plaintiff in error, as an individual, is within the jurisdiction of the United States, states a fiction.

The Government lays great stress upon the idea that the United States protects the plaintiff in error and, therefore, he should pay the tax. We have already covered this matter fully in our original brief, and shown that that is merely a political question, and that the Government has no legal duty to take any measures outside of its own boundaries.

The Government's proposition that the taxing power of the United States knows no limits other than those expressly mentioned in the Constitution is, we think, sufficiently answered in the authorities cited in our original brief at pages 42 and 43. Among the implied limitations is that the taxing power is limited to persons and property within the territorial jurisdiction because governmental jurisdiction in matters of taxation depends upon the power to enforce its mandates by action within its own borders; and in this regard the Fourteenth Amendment imposes no greater limitation upon the states than the fifth imposes upon the United States (Shaffer v. Carter, 252 U. S. 37, 54). This is a principle inherent in constitutional government.

III.

The Solicitor-General, in his brief, asserts that the question of statutory construction is an afterthought. In this the learned Solicitor-General is in error. That question was presented to the court below by the plaintiff, both by brief and oral argument. In any event, since this case comes directly by writ of error to the District Court, the whole case is before this Court and not merely the constitutional question (Towne v. Eisner, 245 U. S. 418).

The question of statutory construction is, we think, fully covered by our original brief, pages 51 to 57. The Government has not pointed out any express declaration of authority in the act to tax this plaintiff under the theory of taxation, and, therefore, the rule of construction announced in United States v. Goelet, 232 U. S. 293, applies.

IV.

The Solicitor-General in his brief has not answered the position taken by the plaintiff in error as to the taxes in violation of the Fifth Amendment. We are not questioning those authorities which state that that amendment is not an independent limitation on the taxing power, but we do assert that any attempt to impose a tax, otherwise unlawful, is a mere ex-

tortion under the guise of taxation, and is in violation of the Fifth Amendment, regardless of the form of procedure adopted by the Government for its enforcement. If the tax is lawful the Government can adopt summary methods for its collection; if it is unlawful, proceeding for its collection through the courts of law will not make it lawful. For brevity we refer the Court to the authorities cited on page 48 of our original brief.

V.

We submit that the points V and VI made by defendant in error are entirely lacking in authorities applicable to the case at bar.

In point V it is of no consequence here whether or not, or to what extent, limited or special sovereignty may be rightfully exercised over merchant ships, over piracy, or treason, or cannibalism, or the sale of arms, liquor or opium in the Pacific Islands, or the practice of pharmacy in consular districts in China, or the immunity of diplomatic officers from local laws.

The Solicitor-General cites no decisions in support even of those remote propositions except two, one a decision by the United States Supreme Court and the other by the British High Court of Justice (Q. B. D.).

It is hard to see what a conspiracy against the United States Government in a Government vessel on the high seas, or the conviction of murder for "cannibalism" under the admiralty jurisdiction of England, because three men in a boat adrift at sea killed and ate a boy, has to do with the "power" of the United States to impose income taxes on the property of the plaintiff in error located in Mexico.

It would seem as if the defendant in error, for want of sound law in his support, must have been driven to a similar plea to that used in the English "cannibal" case—"Necessity"—and it is hoped that his plea will meet with a similar fate here.

Point VI in the brief for the Government is as lacking in germane authorities as point V.

Not a single decision is cited with reference to taxation of any sort. The few text writers cited are mostly foreigners who make no pretense of writing concerning law under our Constitution. The American writer cited (pages 20 and 21 of the brief, Webster on Citizenship, pp, 167, 168), says immediately after the language quoted (p. 168):

> "A state cannot pass and enforce a law on aliens making them citizens contrary to their will, when within the state; no more can a state declare its citizens to be aliens *for reason of failure to pay an income tax when resident abroad. The rule is moral in effect, not absolute as a matter of law.*"

The reference to writings of administrative officers of the United States cited on page 21 of the Government's brief, to the general effect that payment on an income tax by a nonresident citizen is an affirmative evidence of citizenship, furnishes no authority for the proposition that the United States can compel him to pay an income tax, by denying him the rights of American citizenship, and thus forcibly expatriating him. For no such power resides in the United States, because the citizen only can "expatriate himself," and that only in the manner prescribed by statute (2 Fed. Stat. Ann., p. 122, sec. 2, 34 Stat. L. 1228).

The decision of the Supreme Court cited (Murray v. Charming Betsy, 2 Cranch. 64), an admiralty case of seizure of a vessel under the Nonintercourse Act, is more of an authority for the plaintiff in error than for the defendant in error; for in the opinion, Mr. Chief Justice Marshall says (l. c. 120):

> "The cases cited at bar, *and the arguments drawn from the general conduct of the United States on this interesting subject*, seem completely to establish the principle that *an American citizen may acquire, in a foreign country, the commercial privileges attached to his domicile, and be exempted from the operation of an act expressed in such general terms as that now under consideration.*"

Apply this doctrine to the case at bar!

Certainly the language of Mr. Chief Justice Waite in Minor v. Happersett, 21 Wall. 162, 166, as quoted by the Solicitor-General on page 22 of his brief, has nothing to do with our questions here, since that was merely an effort of a married woman to compel the registration of her name as a voter—in Missouri.

If the Solicitor-General is depending on the quotation from Story on the Conflict of Laws, found on pages 18 and 19 of his brief, it must be noted that no mention is made of taxing the property rights of citizens domiciled abroad (or of taxing individual citizens on their citizenship). But we, *e converso*, respectfully refer to another quotation from one of the pages cited by the Solicitor-General (Story, Conf. of Laws, p. 22):

> "Another maxim or proposition is, that *no state or nation can by its laws directly affect or bind property out of its own territory*, or bind persons not resident therein, whether they are natural-born subjects or others."

And to supplement, and for the purposes of this case, to complement, the proposition last quoted, we again respectfully recall attention to the language of that great jurist in the Castine case, when he was a Justice of this great Court (Opinion by Mr. Justice

Story, in U. S. v. Rice, 4 Wheat., l. c. 254), and to his concluding words (p. 255):

> "We think it too clear to require any aid from authority."

All of which is respectfully submitted,

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